STATE OF MICHIGAN

COURT OF APPEALS

BCV COLONNADE,

Plaintiff-Appellant,

v

UNITED REALTY COMPANIES, LLC and PETER J. BONASTIA,

Defendants/Cross Defendants,

and

MORRIS HOME TITLE AGENCY a/k/a MORRIS HOME ABSTRACT COMPANY, GORDON KORN, and KIM M. GLADISH,

Defendants/Cross Plaintiffs-Appellees,

and

CHICAGO TITLE INSURANCE COMPANY,

Defendant.

UNPUBLISHED
September 17, 2009

No. 285395
Oakland Circuit Court
LC No. 2006-076348-NO

Before: Sawyer, P.J., and Cavanagh and Hoekstra, JJ.

PER CURIAM.

Plaintiff appeals by right the summary dismissal of its claims against defendants Morris Home Title Agency, Gordon Korn, and Kim Gladish ("defendants"). We reverse.

According to plaintiff's complaint, plaintiff was the owner of a K-Mart in Jackson, Michigan. On November 10, 2005, plaintiff entered into a sale-purchase agreement with United Realty Companies, through United's agent Peter Bonastia, whereby United agreed to purchase

from plaintiff the K-Mart for $8,500,000.[1] After United and Bonastia failed to perform in accordance with the terms of the contract, the sale-purchase agreement was terminated. On February 6, 2006, a reactivation of sale-purchase agreement was entered into between the same parties. It required a cash deposit of $100,000 to be held in escrow until the closing date. The escrow agent was Chicago Title Insurance Company and Morris Home was its authorized agent. Subsequently, upon inquiry by plaintiff, Kim Gladish of Morris Home confirmed that a $100,000 deposit had been received. Again United and Bonastia failed to perform in accordance with the terms of the contract. However, when plaintiff attempted to obtain the $100,000 held in escrow, plaintiff was advised by Gordon Korn of Morris Home that the $100,000 had not been deposited. Plaintiff's three-count complaint followed on August 1, 2006, which included claims against United and Bonastia, as well as these defendants.

On November 22, 2006, a default judgment was entered against United in the amount of $100,000, and United's motion to set aside the default judgment was denied on March 5, 2007. On January 24, 2007, defendants Morris Home, Korn, and Gladish filed a motion for leave to amend their answer to plaintiff's complaint. Because the initial answer to the complaint was unclear as to whether defendants had received the disputed deposit when, it fact, they had not, defendants requested that they be permitted to amend their answer and the motion was granted.

On June 1, 2007, defendants filed their motion for summary disposition pursuant to MCR 2.116(C)(7) and (C)(10). Their arguments included that: (1) the claims against them were barred because, under the terms of both failed agreements, they were released from liability, (2) plaintiff failed to raise a genuine issue of material fact in support of its claims because these defendants never received a $100,000 cash deposit from either United or Bonastia, who admitted that fact, and (3) the alleged misrepresentation made to plaintiff was merely an innocent mistake, not a fraudulent, willful, or grossly negligent mistake. Attached in support of the motion were (1) the failed agreements between plaintiff and United, (2) the affidavits of Korn and Gladish, and (3) the email by Gladish which confirmed a $100,000 deposit.

Plaintiff responded to the motion for summary disposition, arguing that: (1) its claims were not barred because defendants' conduct, at minimum, was grossly negligent thus the release contained in the failed agreements was not triggered, (2) defendants were equitably estopped from claiming mistake because plaintiff reasonably relied on their assurances that the $100,000 was held in escrow, (3) defendants provided two separate emails confirming the receipt of the $100,000 cash deposit and no "mistake" was claimed until plaintiff demanded the money—facts which clearly gives rise to a question of fact, (4) whether the misrepresentations made by defendants were fraudulent, willful, grossly negligent, or innocent involved considerations of credibility, intent, and state of mind which the trial court cannot weigh in deciding a summary dismissal motion, and (5) discovery at that point in time was significantly incomplete. In support of its brief in opposition to the motion, plaintiff attached documents which allegedly verified that: (1) defendants were in possession of the reactivation of sale-purchase agreement on February 6, 2006, (2) plaintiff's agent contacted defendants by email on February 9, 2006, to

[1] Although United, Bonastia, and Chicago Title Insurance Company were named defendants in the underlying matter, we refer only to Morris Home, Korn, and Gladish as "defendants" for purposes of this appeal.

confirm defendants' receipt of the $100,000 deposit and attached to the email was a memorandum detailing the entire underlying transaction, (3) Gladish responded on February 10, 2006, confirming that a $100,000 deposit was received "pursuant to the terms of the purchase agreement," and (4) an email sent by Korn on April 12, 2006, to the closing agent also confirmed that the $100,000 deposit had been received.

Defendants replied to plaintiff's brief in opposition to their motion for summary disposition, primarily arguing that, at most, they were merely negligent in reporting that the $100,000 deposit had been received; thus, the release in the purchase agreement was operative. The confusion was understandable, according to defendants, because they were handling two business transactions at the same time involving the same K-Mart in Jackson. Purportedly, United was involved in a deal to re-sell this K-Mart to Dowell Realty Associates and that purchase agreement also required a $100,000 escrow deposit, which was in fact received by defendants. Thus, when plaintiff inquired as to whether the escrow deposit had been received, Gladish mistakenly confused the two different transactions and replied in the affirmative. But the escrow deposit defendants received had, in fact, been in compliance with the United/Dowell Realty purchase agreement and not related to the business transaction between plaintiff and United.

By opinion and order dated August 20, 2006, the trial court agreed with defendants and granted their motion for summary dismissal. The court noted that, under the terms of the sale documents, defendants could not incur liability "except for willful misconduct or gross negligence, as long as the escrow agent has acted in good faith in the performance of its duties hereunder." The court held, first, that nothing had been presented that would refute defendants' claim that they acted in good faith, although an honest mistake was made. And, second, at most, the evidence established ordinary negligence; thus, all claims against these defendants were dismissed. Plaintiff's motion for reconsideration was denied. Subsequently, plaintiff was granted a default judgment in the amount of $100,000 against Bonastia and Bonastia's motion to set it aside was denied. On August 6, 2007, a stipulated order of dismissal of claims against Chicago Title was entered. Thereafter, plaintiff filed this appeal.

Plaintiff argues that the trial court erred in granting defendants' motion for summary disposition because genuine issues of material fact existed. We agree. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition brought under MCR 2.116(C)(10) is properly granted if, after viewing the evidence in the light most favorable to the nonmoving party, it is determined that no factual dispute exists. See MCR 2.116(C)(10); *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998). A motion for summary disposition brought under MCR 2.116(C)(7) is properly granted if, after considering all documentary evidence submitted by the parties, the undisputed facts establish that the claim is barred because of release. MCR 2.116(C)(7), 2.116(G)(5); *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001).

First, plaintiff argues that a genuine issue of material fact existed as to whether defendants' conduct was grossly negligent in light of the facts that defendants twice wrongly confirmed to plaintiff that a $100,000 deposit had been made by United and/or Bonastia in conformity with their sale-purchase agreement. We agree.

Section 14.E of the sale-purchase agreement provided as follows:

> It is agreed that the duties of the Escrow Agent are only as herein provided, and . . . are purely ministerial in nature, and that the Escrow Agent shall incur no liability whatever except for the willful misconduct or gross negligence, as long as the Escrow Agent has acted in good faith. The Seller and Purchaser each release the Escrow Agent from any act done or omitted to be done by the Escrow Agent in good faith in the performance of its duties hereunder.

Defendants argue on appeal that the contract language is unambiguous—they were released "from liability except for three circumstances: conduct lacking in good faith; gross negligence; and willful misconduct." Defendants claim that their conduct neither amounted to gross negligence nor willful misconduct. Plaintiff argues that defendants' conduct was grossly negligent, especially considered in the context that this was a multi-million dollar real estate transaction in an unpredictable market and an escrow agent's business is confirming and holding deposits.

In determining whether a plaintiff has established gross negligence, the focus must be on a defendant's actions, not the result of those actions. See *Maiden v Rozwood*, 461 Mich 109, 127 n 10; 597 NW2d 817 (1999). Here, the alleged grossly negligent actions involved the sending of two emails by defendants' agents. The first was sent by Gladish in response to a request by plaintiff's agent to confirm the receipt of the $100,000 deposit, and said: "Please allow this email to confirm that we have received the Wire Transfer of the $100,000.00 Deposit pursuant to the terms of the purchase agreement. Said deposit is in the First Morris Bank, Morris Home Abstract Co. Trust Account, Sub Account No. 36-013507-9, entitled Jackson Kmart." The second email was sent by Korn in response to a question as to when the $100,000 escrow deposit would be forwarded to plaintiff's closing agent and Korn responded: "I have been out of the office for a few days but I will take care of the wire for you on Thursday."

"Negligence" is the failure to use ordinary care, i.e., care that a reasonably careful person would use under the circumstances that existed. See M Civ JI 10.02. Gross negligence "falls somewhere between ordinary negligence and an intentional act." *Jennings v Southwood*, 446 Mich 125, 135; 521 NW2d 230 (1994). As the parties agree, "gross negligence" is "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." *Xu v Gay*, 257 Mich App 263, 269; 668 NW2d 166 (2003), quoting *Jennings*, *supra* at 136. This definition suggests "almost a willful disregard of precautions or measures to attend to safety and a singular disregard for substantial risks." *Tarlea v Crabtree*, 263 Mich App 80, 90; 687 NW2d 333 (2004). "It is as though, if an objective observer watched the actor, he could conclude, reasonably, that the actor simply did not care about the safety or welfare of those in his charge." *Id*.

Unless reasonable minds could not differ, whether conduct constitutes gross negligence is usually a factual question for the jury. *Tallman v Markstrom*, 180 Mich App 141, 143; 446 NW2d 618 (1989). Here, contrary to the trial court's holding, we conclude that reasonable minds could differ as to whether defendants' conduct was grossly negligent. Standing alone, the evidence that defendants sent two emails mistakenly confirming receipt of a deposit may not be sufficient proof of "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." But there was other evidence, and inferences therefrom, that must be

considered in the light most favorable to plaintiff, including that: (1) defendants were in possession of the reactivation of sale-purchase agreement on February 6, 2006, which clearly set forth the $100,000 cash deposit requirement, (2) plaintiff's February 9, 2006, request for confirmation of the deposit clearly set forth, in a memorandum, the details of the entire underlying business transaction, as well as the named parties involved, (3) Gladish responded the next day to that request, confirming that the deposit was received "pursuant to the terms of the purchase agreement," and was deposited into a specific and identifiable bank account that was entitled "Jackson Kmart," (4) two months later, on April 12, 2006, five days before the scheduled closing, Korn responded to the closing agent's request for the deposit with "I will take care of the wire for you," implying that the deposit had been made and would be forthcoming, and, most importantly, (5) defendants were handling *two* business transactions at the same time involving the same K-Mart in Jackson and *both* required a $100,000 escrow deposit.

Viewing the evidence and all reasonable inferences in the light most favorable to plaintiff, we conclude that a reasonable jury could find that defendants' conduct was grossly negligent. That is, if an objective observer was watching defendants' actions, the observer could reasonably conclude that, even if defendants did not intend to cause injury to plaintiff, they clearly did not care if they did cause such injury. Defendants' actions were surprisingly and significantly lacking. It appears that defendants failed to exercise even the slightest degree of attention or care with regard to their role as the escrow agent for this real estate transaction. Defendants had all of the necessary information in which to perform their duties and admitted that there was a significant potential for confusion in light of the second transaction involving the same property. Nevertheless, plaintiff was led to believe, quite convincingly, for months, that defendants were in receipt of the escrow deposit and that the real estate transaction could close as scheduled. Accordingly, a genuine issue of material fact existed as to whether defendants' conduct was grossly negligent and the trial court's decision to the contrary is reversed.

Next, plaintiff argues that genuine issues of material fact existed as to its claims of fraud and misrepresentation arising from defendants' confirmations to plaintiff that a $100,000 deposit had been made by United and/or Bonastia in conformity with their contract. We agree.

To establish a fraud or misrepresentation claim, a plaintiff must prove that (1) defendants made a material representation, (2) it was false, (3) when they made it, defendants knew it was false or made it recklessly, without knowledge of its truth or falsity, (4) defendants made it with the intent that plaintiff would act upon it, (5) plaintiff acted in reliance upon it, and (6) plaintiff suffered damages. *Mitchell v Dahlberg*, 215 Mich App 718, 723; 547 NW2d 74 (1996), quoting *Arim v General Motors Corp*, 206 Mich App 178, 195; 520 NW2d 695 (1994).

Defendants argue that plaintiff failed to establish a genuine issue of material fact with regard to the third element because Gladish's confirmation of the $100,000 deposit was based on her belief that the request pertained to the United/Dowell Realty purchase agreement, not the agreement between plaintiff and United. But, for the reasons discussed above, we conclude that a genuine issue of material fact exists as to whether her mistaken confirmation of the $100,000 deposit at issue here was made recklessly—particularly, in part, *because of* the existence of this second transaction involving the same K-Mart that defendants were handling. Accordingly, we reverse the dismissal of these fraud and misrepresentation claims.

In light of our resolution of these issues, we decline to address plaintiff's arguments on appeal pertaining to whether defendants were equitably estopped from claiming "mistake" and whether summary disposition was inappropriate because discovery was incomplete. And we reject plaintiff's claim that the trial court abused its discretion when it granted defendants' motion to amend their answers to the complaint. See MCR 2.118(A)(2); *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 583; 624 NW2d 180 (2001). The amendment merely clarified defendants' denial of their receipt of the disputed $100,000 deposit, consistent with their affirmative defenses, as well as Korn's correspondence dated April 27, 2006, apparently responding to plaintiff's request for release of the deposit.

Therefore, the trial court's summary dismissal of plaintiff's complaint is reversed and this matter is remanded for further proceedings. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra